

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff.

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

RESPONSE OF PROPOSED PRESERVATION
AMICI TO OBJECTIONS OF THE STATE OF
NEW JERSEY TO MOTION FOR LEAVE TO
FILE BRIEF AS *AMICI CURIAE*

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The National Trust for Historic Preservation in the United States and the Municipal Art Society of New York (proposed "Preservation Amici") respectfully respond to the Objections of the State of New Jersey to Preservation Amici's motion for leave to file a brief as *amici curiae* in support of the Exceptions of the State of New York in this case. Proposed Amici seek to file a brief as *amici curiae* (the "Preservation Brief") in order to "offer a distinct perspective on the landmark preservation issues raised in this case." Motion for Leave at 1. New Jersey, however, now contends that leave should be denied because (1) the premise on which the proposed Preservation Brief is based is "pure fantasy" and (2) the Brief would "add little, if any, meaningful legal analysis to the issues to be addressed by the Court." Objection at 5-6. New Jersey is wrong, both as a matter of law and fact, for the following reasons: (1) the premise on which the Preservation Brief is based is the same premise on which this Court accepted

jurisdiction of this case, (2) the record contains evidence substantiating the possibility that the Federal Government might someday relinquish control of all or part of Ellis Island, and, in any event, is likely to enter into a long term lease to permit development on the south end of the Island; and (3) the significance of historic preservation issues has previously been acknowledged by both the Special Master and this Court.

A CASE OR CONTROVERSY EXISTS

New Jersey's claim that the Preservation Amici's arguments are based on a "speculative scenario" that will never come to pass fails as a matter of law because this Court has already decided that the very same "speculative scenario" presents a case or controversy that is ripe for adjudication. When New Jersey originally filed its motion seeking leave to file a complaint in April 1993, both New York and the United States opposed granting the motion on the ground that the dispute between New York and New Jersey did not present a "serious current controversy" that was "concrete" enough to warrant exercise of this Court's original jurisdiction. (R. at 14-16.) By accepting jurisdiction on May 16, 1994, this Court found otherwise, and, in so doing, necessarily concluded that a set of circumstances could arise where the laws of New York and New Jersey could come into conflict on Ellis Island—an area now under exclusive federal jurisdiction where the laws of neither State apply directly.

It is this same set of circumstances—which New Jersey attacks as involving an "exceedingly unlikely hypothetical"—that provides the point of departure for the arguments advanced by the Preservation Amici in their proposed Brief. The Preservation Amici will certainly advocate vigorously to prevent such a scenario from ever becoming a reality. The National Park Service currently exercises exclusive jurisdiction over Ellis Island, and, so long as

that remains the case, the Island's historic sites and buildings will receive protection under a single and responsible preservation program, as required by federal law. However, since this Court has acknowledged the possibility that exclusive federal jurisdiction may eventually be relinquished, and the Special Master has drawn his proposed boundary with an eye to the laws of both States applying to Ellis Island, Proposed Amici should be allowed to file an amicus brief arguing that the Report's "split sovereignty" remedy would place the integrity of Ellis Island's historic character in jeopardy.

THE RECORD SUPPORTS PRESERVATION AMICI'S ARGUMENTS

New Jersey's claim that the Preservation Amici's "predictions are entirely without support in the record" is utterly untrue. Objection at 8. Both testimony at trial and documents submitted by the Preservation Amici¹ in connection with summary judgment and post-trial briefing (which are clearly part of the "record" in this original case)² demonstrate that the possibility of the Federal Government eventually relinquishing its control over all or part of Ellis Island is real. Indeed, counsel for New Jersey himself conceded at trial that "periodically . . . the Parks Service looks at proposals which . . . could open the door to substantial private action and activities on the island, again opening the door to exercise of [State] sovereignty in a more tangible way." (Tr. at 63 (Opening Statement of Joseph L. Yannotti); *see* Appendix to Post-Trial

¹ Amici participated in the proceedings before the Special Master in an amicus group that also included the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council. These latter organizations have filed a separate Amicus Brief in support of the Exceptions of the State of New York, in which the National Trust and the Municipal Art Society elected not to join because of a continuing desire to bring to the Court's attention the "impracticality" of the "split sovereignty" remedy recommended by the Report.

² New Jersey's contention that the record in this original case is limited to evidence offered by the parties is belied by the fact that the Court has many times "relied on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); *see, e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting).

Brief of Preservation Amici (Docket No. 368) (collecting press reports concerning proposed private development efforts on Ellis Island from 1954 to 1995)). The reality of this threat was driven forcefully home days after the Special Master's Report was issued when New Jersey officials were reported in the press to be hopeful that the Report's recommendations would rekindle private development plans for Ellis Island. *For Ellis Island, New Talk of a Hotel, a Bridge, and Masses Yearning to Get in Free*, NEW YORK TIMES, Apr. 3, 1997. In light of such evidence, New Jersey's contention that nothing in the record supports the Preservation Amici's concerns is simply unfounded.

HISTORIC PRESERVATION CONCERNS SHOULD BE ADDRESSED IN THIS CASE

What is most disingenuous about New Jersey's Objection is its refusal to acknowledge that historic preservation concerns have been, and should continue to be, addressed in this original case. When New Jersey opposed the participation of the Preservation Amici (as then constituted) at both the summary judgment and post-trial phases of the proceedings (Docket Nos. 269 and 338), the Special Master overruled New Jersey's objections on both occasions, indicating that historic preservation concerns *should* play a part in the resolution of this interstate boundary dispute. (See Interim Order (Docket No. 286) at 8 n.36.)

Moreover, the participation of the original Preservation Amici had a substantial effect on the Report's recommendations. The "equitable reconstitution" recommended by the Special Master appears to have been largely provoked by the Preservation Amici's arguments concerning the impracticality of any "split jurisdiction" remedy. (R. at 162-66). Indeed, the Special Master, adopting, in part, the Amici's reasoning, held out the hope that the proposed reconfiguration of the "original island" would "retain the historic connection between the Main

Building—the immigration locus—on the original island and the City of New York." (R. at 166.) Proposed Amici contend that the Special Master did not go far enough to protect the historic preservation interests he thus recognized, but, in light of this record, it is difficult to understand how New Jersey can now argue such historic preservation concerns should play no role in this case.

Those issues should be particularly relevant in a proceeding before this Court, which long ago acknowledged the importance of historic preservation issues, in a case upholding the validity of New York City's preservation laws. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). It should do the same here. While this case turns primarily on the interpretation of a compact between two States, historic preservation considerations must play a part because its resolution requires more than drawing a line down the middle of a desolate and uninhabited stretch of river or lake. It potentially involves drawing a line through an ensemble of buildings that forms the core of an island that is etched into the memories of millions of immigrants and their descendants as the Gateway to America. (R. at 33 ("Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions.").) The parties have not addressed this important issue in their Briefs, but Amici are ready and willing to furnish the Court with an informed assessment of how the outcome recommended by the Report would affect the preservation future of Ellis Island. Leave should be granted to allow them to do so.

WHEREFORE, Proposed Amici respectfully request that the Objections of the State of New Jersey be overruled and leave be granted to Amici to file the Preservation Brief.

Dated: Washington, D.C.
August 20, 1997

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